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No. 197

In the Supreme Court of the United States

OCTOBER TERM, 1941

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

CAROLINA FREIGHT CARRIERS CORPORATION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the District Court (R. 25–34) is reported in 38 F. Supp. 549. The report of the Interstate Commerce Commission (R. 6–11) is reported in 24 M. C. C. 305.

JURISDICTION

The decree of the District Court was entered on April 5, 1941 (R. 34). The petition for appeal was presented on May 29, 1941, and was allowed on the same day (R. 35–38). The jurisdiction of this Court is conferred by the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 210, 219

(U. S. C., title 28, secs. 45, 47a); section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, par. (4) (U. S. C., title 28, sec. 345); and by section 205 (h) of the Motor Carrier Act, 1935, c. 498, 49 Stat. 543 (U. S. C., Supp. V, title 49, sec. 305 (h)).

QUESTION PRESENTED

The Interstate Commerce Commission granted a certificate of public convenience and necessity under the "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935, authorizing appellee to carry the classes of commodities in fact hauled by it in substantial quantity on and after June 1, 1935, over irregular routes between the places in fact substantially served by it on and after that date. The question is whether the Commission erred in so limiting the authority given in the certificate without regard to appellee's holding itself out on and after the crucial date as a common carrier of general freight to and from any points in a large Atlantic seaboard area.

STATUTE INVOLVED

The relevant provisions of the Motor Carrier Act, 1935, applicable at the date of the Commission's order, July 10, 1940, are set forth in the Appendix, *infra*, pp. 31–33.

STATEMENT

The facts, appearing from the findings of the Interstate Commerce Commission and from the

evidence presented in proceedings before the Commission, may be summarized as follows:[1]

Mauney Transfer Company, Inc., appellee's predecessor in the trucking business, commenced operation in 1931, with three trucks (R. 7; 77). This number had been increased to eight by June 1, 1935 (R. 7; 26, 62). In November 1936, when the organizers of the Carolina Freight Carriers Corporation acquired the business and equipment of the Mauney Company, the number of usable motor vehicles had fallen to four (R. 46). Early in 1937 the Carolina Corporation, organized for the purpose, took over the trucking business and equipment (R. 7; 45–46).[2] At the time testimony was taken before the Commission's examiner, in October 1938, the number of cargo-carrying units in operation had increased to 17 (R. 7; 46).

On and for some time prior to June 1, 1935, appellee obtained its business through a freight brokerage firm which solicited shipments of all kinds of freight for several truck operators (R. 77–80, 127–139); a general manager of appellee testified that the company sought all kinds of freight in its carrying business (R. 60).

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[1] In the following statement, the references preceding the semicolons are to the Commission's findings and the succeeding references are to the supporting evidence.

[2] For the purposes of this litigation, Mauney Transfer Company, Inc., and Carolina Freight Carriers Corporation may be treated as synonymous; accordingly, the term "appellee" will hereinafter be used in reference to both.

Appellee in its registration certificate filed under the code of fair competition for the trucking industry on July 11, 1934, stated that 60 percent of its operations were those of a contract carrier and 40 percent were those of an "anywhere for hire" carrier (R. 7; 163–166). There was also testimony by representatives of shippers that appellee was supposed and expected to undertake to serve any points in the eastern seaboard area set out in appellee's application (R. 9; 44, 77, 82–83, 84, 94, 98); however, a general manager of appellee stated that the company did not solicit business north of New York (R. 10; 62).

Practically all of appellee's north-bound operations prior to June 1, 1935, consisted of transporting cotton yarn from Clover, South Carolina, and points in North Carolina within 75 miles of Cherryville, North Carolina, to Baltimore, Elks Mills, and Hagerstown, Maryland, Wilmington, Delaware, points in Pennsylvania on and east of United States Highway 11, points in Middlesex, Union, Essex, Hudson, Passaic, Bergen, Somerset, and Morris Counties, New Jersey, New York, Newburgh, and Clark Mills, New York, and about 10 points in Massachusetts and five points each in Rhode Island and Connecticut (R. 8; 62, 66, 71, 99, 155–163, 165). Shipments of some other commodities, including asbestos textile products (R. 8; 81, 82, 100), empty spools and boxes (R. 8; 58, 100), and rubber tires and tubes (R. 8; 44,

99–100), were also transported north-bound.[3] During the same period south-bound shipments consisted chiefly of petroleum products in containers (R. 9; 58–59, 93), linoleum (R. 9; 101), canned goods (R. 9; 59, 102), beer and ale (R. 9; 161–162), roofing material and screen wire (R. 9; 102, 116, 162), batteries (R. 102, 116), paper containers (R. 121), and hardware (R. 123);[4] these originated at a few points in Massachusetts, New Jersey, Pennsylvania, and Maryland, and were destined to a few points in Virginia and South Carolina and to points scattered throughout North Carolina (R. 8; 155–163).

In a sample period subsequent to June 1, 1935, during which approximately 430 shipments were handled by appellee, approximately 330 shipments consisted of the same commodities substantially carried during the earlier period, and in the same relative proportions; 85 shipments consisted of a few commodities (chiefly rayon) not handled before June 1, 1935 (R. 8; 166–178). The remaining

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[3] It does not appear that rubber tires or tubes were hauled after June 1, 1935 (R. 167–178).

[4] A few other commodities, such as stearic acid, cocoa, and candy, were carried south before June 1, 1935, but were not transported after that date.

The shipments of batteries, paper containers, and hardware were negligible both before and after June 1, 1935 (R. 155–163, 166–178).

Some textile machinery was hauled between points in Virginia, North Carolina, and South Carolina before the "grandfather" date (R. 56, 100, 115); afterward this carriage was no longer undertaken (R. 166–178).

15 shipments consisted of various commodities transported infrequently or which moved between points not served prior to June 1, 1935 (R. 9; 166–178). After that date, hauling of some of the commodities previously handled and trips to some of the places earlier served were not continued.

On January 24, 1936, appellee applied to the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing operation as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities * between all points in South Carolina, North Carolina, Delaware, New Jersey, Connecticut, Rhode Island, and Massachusetts, those in Virginia east of and including the Shenandoah Valley, those in Maryland and Pennsylvania on and east of United States Highway 11, and those in New York east of Binghamton and south of Albany, over irregular routes, and between Cherryville, North Carolina, and Boston, Massachusetts, over a regular route through Henderson, North Carolina, Richmond, Virginia, Baltimore, Maryland, Philadelphia, Pennsylvania, and New York, New York (R. 7). Rail carriers in southern and official classification territories and cer-

* Appellee excepted from this category commodities of unusual value, those in bulk, those requiring special equipment (such as tank or refrigerator truck), those injurious to other lading, livestock, automobiles, and high explosives (not including small-arms ammunition).

tain motor carriers operating in the territory involved opposed the application (R. 7, 41, 42, 43) but offered no evidence (R. 2, 7). A hearing was conducted before an examiner of the Commission; subsequently exceptions, accompanied by supporting briefs, were filed by applicant and rail-carrier protestants to the proposed report submitted by the examiner (R. 7, 18). Division 5 of the Commission gave its decision in a report dated July 10, 1940:

> We find that applicant's predecessor in interest was on June 1, 1935, and continually since it and its predecessor have been, in bona fide operation as a common carrier by motor vehicle, in interstate or foreign commerce (1) of cotton yarn from all points in Gaston, Lincoln, Cleveland, Rutherford, McDowell, Burke, Catawba, Alexander, Iredell, Rowen, Davidson, and Davie Counties, N. C., to Hagerstown, Md., New York, N. Y., Pawtucket and Providence, R. I., all points in Pennsylvania on and east of U. S. Highway 11, and points in Middlesex, Union, Essex, Hudson, Passaic, Bergen, Somerset, and Morris Counties, N. J., (2) of asbestos textile products from Charlotte, N. C., to Philadelphia and North Wales, Pa., Trenton, Newark, Passaic, and Paterson, N. J., New York, N. Y., Middletown, Conn., Providence and Pawtucket, R. I., and Boston and Hudson, Mass., (3) of supplies and materials used in the manufacture of asbestos textile products from Harrison and Perth

Amboy, N. J., to Charlotte, N. C., and empty spools and boxes in the reverse direction, (4) of petroleum products in containers from Sewaren, N. J., and Marcus Hook, Pa., to Columbia and Greenville, S. C., and to all points in North Carolina, (5) of linoleum from Paulsboro, N. J., Marcus Hook, Pa., and East Walpole, Mass., to points in North Carolina and to Spartanburg and Greenville, S. C., (6) of canned goods from Baltimore, Md., to Shelby, N. C., (7) of beer and ale from Newark, N. J., to Gastonia and Wadesboro, N. C., and (8) of roofing and screen wire from York, Pa., to all points in North Carolina, all over irregular routes; that applicant is entitled to a certificate authorizing continuation of such operation; and that the application in all other respects should be denied (R. 10–11, 24 M. C. C. 309–310).

Motions by appellee for reopening and reconsideration were denied by the full Commission on November 4, 1940 (R. 15).

Appellee on November 26, 1940, filed in the District Court of the United States for the Western District of North Carolina, Charlotte Division, a complaint praying that the order of the Commission entered on July 10, 1940, be set aside and annulled insofar as the order and its accompanying report found that appellee had failed to establish a right to a certificate of public convenience and necessity as claimed in its application under the

"grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935 (R. 1–6); it prayed that the Commission be directed on remand to review appellee's case "under a proper interpretation and construction of the Statute, and thereon issue a reformed order so as to permit the plaintiff to be granted franchise rights as a common carrier over irregular routes in accord with its just rights under the law" (R. 6). Answers were filed by the United States and by the Interstate Commerce Commission (R. 13–16). The case was heard upon final hearing before a court of three judges convened pursuant to the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220 (U. S. C., title 28, sec. 47) (R. 12–13). A transcript of all the evidence received before the Interstate Commerce Commission, certified by the Secretary of the Commission, was received in evidence by the District Court (R. 25), and is part of the record on appeal (R. 43–178).

On April 5, 1941, the court rendered its opinion, holding that the prayer of the complaint should be granted (R. 25–34); the court made findings of fact and announced conclusions of law (R. 22–24), and on the same day entered its final decree (R. 34). A petition for appeal was presented by the United States and the Interstate Commerce Commission on May 29, 1941, and was allowed by the District Court on the same day (R. 35–38).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding that the Commission was without power in granting the certificate of public convenience and necessity to restrict its authorization to the classes of commodities in fact carried in substantial quantity by appellee on and since June 1, 1935, and to the places in fact substantially served by appellee on and since that date.

2. In setting aside and annulling the order of the Commission.

SUMMARY OF ARGUMENT

Decision of the present case is controlled by *Loving* v. *United States*, 32 F. Supp. 464, affirmed *per curiam*, 310 U. S. 609. The "grandfather" clause contained in section 206 (a) of the Motor Carrier Act, 1935, was intended to secure continuance of motor vehicle carrier businesses established on June 1, 1935, in the operations then and continuously since conducted by them. Appellee had actually engaged substantially in the transportation of a few classes of commodities between a few regularly visited places, and incidentally in the carriage of other scattered commodities and between other points. The Interstate Commerce Commission's findings of fact in this regard are supported by the record, and are conclusive. Only substantial transportation satisfies the statutory requirement of bona fide operation, and ap-

pellee's certificate was correctly restricted accordingly. An alleged holding out by appellee to render service much more extensive in commodities and places would not enlarge its "grandfather" rights under the statute beyond those determined by the Commission. The Commission has not discriminated against appellee as an irregular-route carrier, favoring regular-route common carriers. The authorization given appellee by the Commission is virtually as broad as the kind of business actually conducted substantially and incidentally by appellee, and regardless of the effect of the Commission's order on appellee's profits appellee may not obtain larger rights than the express provisions of the statute allow.

ARGUMENT

THE COMMISSION IS EMPOWERED UNDER THE STATUTE TO LIMIT APPELLEE'S AUTHORITY TO THE COMMODITIES IN FACT CARRIED IN SUBSTANTIAL QUANTITY AND PLACES IN FACT SUBSTANTIALLY SERVED ON AND AFTER THE "GRANDFATHER" DATE

Section 206 (a) of the Motor Carrier Act, 1935, forbids common carriers by motor vehicle from engaging in interstate operations without a certificate of public convenience and necessity to be issued by the Interstate Commerce Commission under section 207 (a) of the Act. The "grandfather" clause of section 206 (a) provides, however, that:

> * * * if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation * * *.

The court below held that appellee could bring its case within the terms of this proviso and become entitled to a certificate as applied for without showing that it had operated actually and substantially on and after June 1, 1935, in transporting the commodities and serving the places named in the application. The opinion reasons (R. 29–30) that since appellee conducted a substantial volume of business in the area applied for and held itself out to the public as willing and able to carry general freight between any points in that area[a] it qualified under the statutory clause for an authorization as extensive as that requested in its application. We think, on the contrary, that the requirement of "bona fide operation as a common carrier * * * within the territory for which application is made" is not

[a] The District Court made a finding of fact to this effect (R. 22–23), although the Commission omitted to make any finding on the issue (R. 10). In this brief we concede, *arguendo*, that appellee did make its alleged representations of ability and willingness to serve. It is our view that appellee's holding out, of itself, is immaterial.

satisfied, to the extent here claimed, by so scant a showing.

1. *The Loving case.*—The opinion of the court below characterized the Commission's view of appellee's case as "quite without precedent" (R. 31). We think, however, that it is clearly supported by the existing judicial authorities,[7] and that previous litigation in the federal courts governs this case.

In *Loving Common Carrier Application,* 12 M. C. C. 571, applicants sought a certificate for carriage of general commodities throughout Oklahoma, Texas, Kansas, Colorado, and New Mexico. Their irregular-route operations had consisted chiefly in transporting fruits and vegetables, batteries and parts, fiberboard boxes, glass, oil in packages, and canned goods; they had carried some poultry, cottonseed cake, burlap bags and other freight in insubstantial quantities. The points actually served by applicants were principally in Oklahoma and eastern Colorado. The Commission issued a certificate accordingly, ruling that applicants' holding out to transport general

[7] Several of the states have had local motor carrier legislation containing saving clauses substantially like that of the federal Motor Carrier Act. State court decisions construing the "grandfather" clauses of those state laws accord altogether with the interpretation given to section 206 (a) by the Interstate Commerce Commission. *E. g., Gulf M. & O. R. Co.* v. *Luter Motor Express,* 1 So. (2d) 231 (Miss.); *Matter of Santini Bros., Inc.,* v. *Maltbie,* 260 App. Div. 545; *Whinney* v. *Public Serv. Comm.,* 116 Pa. Super. 472.

commodities in all of the states named in the application could not enlarge applicants' "grandfather" rights beyond the scope of substantial service that they had been performing. The Commission stated:

> * * * In considering numerous applications presenting like issues, we have held that an applicant must have been in actual operation on the statutory date, and that a holding out to serve is not sufficient in and of itself to establish bona fide operations as that term is used in section 206 (a), in the absence of evidence of operations consistent with such holding out. * * * (12 M. C. C. 571, at 575.)

On application to a federal district court to suspend the order, applicants' complaint was dismissed, the court adopting the theory of the Commission in interpreting the saving clause in section 206 (a). *Loving* v. *United States,* 32 F. Supp. 464.

The opinion of the three-judge court rejected the applicants' contentions by saying:

> * * * We believe that bona fide operation includes actual operations conducted carried on by a carrier prior to June 1, 1935, and subsequent thereto, and is not to be limited to actual physical operations conducted on the 1st day of June, 1935. A mere offer to perform the service, without any actual performance thereof, on and prior to the "grandfather" date, is not sufficient to

> authorize the issuance of a certificate of convenience and necessity by the Commission. An occasional service, infrequently performed prior to June 1, 1935, unless such service is seasonal, is insufficient, as there must be a bona fide operation to warrant the issuance of a certificate by the Commission without proof as to the necessity and convenience to be served by the granting of such authority. * * * (32 F. Supp. 464, at 466.)

On appeal to this Court, the judgment was affirmed *per curiam*, 310 U. S. 609. The report of the Commission, the opinion of the district court, and appellants' Statement as to Jurisdiction (No. 879, October Term, 1939, pp. 4–10), filed in this Court, join to show that the issues presented there were the same as those raised on this appeal. We think that case decisive here.[8]

2. *Analysis of the statute.*—In construing the language of section 206 (a), regard must be had for the Congressional purpose in enacting this legislation; the Motor Carrier Act was intended as federal regulation remedial of a disordered

[8] In *Eastern Carrier Corp.* v. *United States*, 31 F. Supp. 232, a trucking company had sought authority to transport general commodities over specified routes; the Commission found that with the exception of a few specific commodities the applicant's transportation had been only sporadic, and, accordingly, denied in part the application for a certificate. The District Court dismissed the complaint attacking the Commission's order, upholding the Commission's construction of the statute.

condition in interstate commercial motor transportation,[9] and, accordingly, the exemption must be read narrowly, in harmony with the general purpose of Congress. See *McDonald* v. *Thompson*, 305 U. S. 263, 266. Insertion of the "grandfather" clause as an exception to the operation of section 206 (a) was a measure of fairness designed to permit the continuance of enterprises already established on June 1, 1935. See *United States* v. *Maher*, 307 U. S. 148, 153. But it could not be supposed that this dispensation extended beyond the transportation service being rendered by a carrier at and after the "grandfather" date, both with respect to commodities carried[10] and places served. This intended limitation is apparent not only from the terms of the "grandfather" proviso but from the provisions of section 208 (a) of the Act, which require that every certificate "shall specify the service to be rendered and * * * the territory within which * * * the motor carrier is authorized to operate." A construction which effected any other result would largely frustrate the regulatory purpose of the statute.

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[9] See section 202, Motor Carrier Act, August 9, 1935, c. 498, 49 Stat. 543 (U. S. C., Supp. V, title 49, sec. 302) (preamble).

[10] Section 203 (a) (14) of the Act defines common carrier by motor vehicle as "any person who or which undertakes, * * *, to transport passengers or property, or any class or classes of property, * * *."

The Interstate Commerce Commission has consistently taken the view in administering the Motor Carrier Act that the "grandfather" proviso affords sanction to carriers only with reference to commodities the transportation of which formed a *substantial* part of their business and to places *substantially* served by the enterprise. *Slagle Contract Carrier Application,* 2 M. C. C. 127; *Jersey Coast Transfer Co., Inc., Common Carrier Application,* 9 M. C. C. 780; *Loving Common Carrier Application,* 12 M. C. C. 571. We believe that this is a sound and essential interpretation of the statute.

Section 204 (c) of the Motor Carrier Act authorizes the Commission to classify motor vehicle common carriers; illustrative of the major types of operation conducted by businesses in the industry are the commodity classifications which the Commission has established: (1) general freight, (2) household goods, (3) heavy machinery, (4) liquid petroleum products, (5) refrigerated liquid products, (6) refrigerated solid products, (7) dump trucking, (8) agricultural commodities, (9) motor vehicles, (10) armored-truck service, (11) building materials, (12) films and associated commodities, (13) forest products, (14) mine ore not including coal, (15) retail-store delivery service, (16) explosives or dangerous articles, (17) specific commodities, not subgrouped. *Classification of Motor Carriers of Property,* 2 M. C. C. 703.

The commercial practice among motor carriers has been that the operations of a particular carrier are limited to definite routes, points, or a territory and to the transportation of one or not more than a few identifiable classes of commodities. See *Eastern Carrier Corp.* v. *United States,* 31 F. Supp. 232, 238. The practice of the industry, reflected by this statement and in the Commission's classification, has important bearing on the meaning of the "grandfather" clause exception. See *United States* v. *Maher,* 307 U. S. 148, 155. A carrier of agricultural commodities and building materials may, of course, transport occasionally a load of household goods to avoid making a return trip empty; but the carriage of household goods would be merely incidental to the main lines of business engaged in by such a carrier. To grant to the carrier a "grandfather" certificate on the basis of incidental as well as substantial transportation would permit it to shift its main business into many diverse incidental lines, with the result that the carrier would secure an authorization far exceeding that contemplated by Congress in enacting the saving clause in section 206 (a).[11] The carrier would then be in a

[11] A system of granting certificates which authorized chief transportation of one or a few classes of commodities and incidental transportation of many more would be administratively impracticable, and, we think, certainly was not intended by Congress. *Eastern Carrier Corp.* v. *United States,* 31 F. Supp. 232, 238.

position to trench upon fields occupied by other "grandfather" operators, seriously jeopardizing effectiveness of the statute's over-all regulatory policy.

The same considerations apply with equal force to the question of places served. It is recognized that many carriers by motor vehicle do not maintain regular routes, but instead serve points in transportation over irregular routes. A proper interpretation of the word "territory" appearing in the statute in reference to these carriers would not of necessity include all points topographically enclosed within the lines of transportation actually travelled by the carrier's vehicles or all points at which the carrier had loaded or discharged shipments; rather, the "territory" would consist of the places substantially served by the carrier. Such a construction would not preclude authority to serve all points in a given area, when substantial service to enough representative points throughout the area is established. See *Howard Hall Co., Inc., Common Carrier Application,* 24 M. C. C. 273, 274, *Howard Hall Co., Inc.,* v. *United States,* 38 F. Supp. 556. In the present case the Commission in fact granted authority to appellee to operate from all points in a number of counties in North Carolina (R. 10). Cf. *George Cassens & Sons Common Carrier Application,* 1 M. C. C. 771, 774–775.

Whether particular operations, with respect to goods transported or places visited, are substantial rather than incidental in character is a question of judgment, for the Commission to determine on the basis of its special knowledge and experience in the motor carrier industry.

3. *This case.*—The Commission found in its report (R. 9):

> On the basis of all the evidence, the commodities shown to have been handled with a degree of regularity both prior to and since June 1, 1935, are cotton yarn, petroleum products, linoleum, canned goods, beer, ale, roofing, screen wire, asbestos textile products, materials used in the manufacture of asbestos textile products, and empty spools and boxes.

If supported by substantial evidence in the record, this finding, impliedly excluding the carriage of other types of goods, is not open to attack.[12] *United States* v. *Maher;* 307 U. S. 148, 153–154, 155. Plainly, the great bulk of shipments carried by appellee consisted of cotton, oil, and a very small number of other commodities. The carriage on and

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[12] We do not understand the court below to have held or appellee to contend that the finding is unwarranted.

From an examination of the exhibits and a reading of the testimony before the Commission it would appear that the report erred, if at all, on the side of liberality to appellee in finding substantial traffic in such commodities as screen wire, roofing, and beer and ale.

after the "grandfather" date, of batteries, machinery; and other freight excluded by the Commission was incidental and not substantial in relation to the volume of appellee's business. Appellee's business was properly classifiable as the transportation of "specific commodities, not subgrouped." It would be properly classifiable as a carrier of general freight and entitled to a correspondingly extensive "grandfather" certificate only if the shipments carried by appellee were distributed among a large number of commodities each of which constituted a substantial contribution to appellee's business in relation to the whole.[13] Cf. *Fisher Common Carrier Application*, 14 M. C. C. 655. That is not the situation when a small number of commodities greatly predominate. It is not, of course, essential to the grant of a certificate covering general freight that each and every commodity within that description has actually been carried. *Reliance Trucking Co., Inc., Contract Carrier Application*, 4 M. C. C. 594, 595. The position taken in the

[13] Our argument here is not rested on the fact and contents of the Commission's Classification Report; as pointed out in the report, its categories are intended as tentative patterns, for general purposes, and not to be inflexibly followed. See *Classification of Motor Carriers of Property*, 2 M. C. C. 703, 704, 714. We have used some of the report's terms for convenience and uniformity of expression, as illustrative of the principles here advanced, which we believe essentially the same as those underlying the Commission's actions in its administration of the Motor Carrier Act.

opinion of the District Court (R. 31) that such a requirement is the only alternative to the result reached by the court below is untenable.

The Commission also made findings (R. 10) concerning the geographical area in which appellee conducted substantial trucking operations:

> On the basis of all the evidence, it is clear that no substantial showing of service has been made to establish bona fide irregular-route operations in the transportation of general commodities from and to all points in the states included in the application.

This finding and its correlative, concerning the places substantially served by appellee (R. 10–11), are conclusive, since warranted, and their effect in law is to restrict appellee's right to a certificate of public convenience and necessity under the "grandfather" clause. The reasons stated above for a similar result with respect to commodities are likewise operative here.

Because of the nature of appellee's business, appearing from the facts of its particular case, the Commission has found it appropriate to state appellee's "territory" in terms of points of origin and destination rather than to delimit an area of operations. Cf. *Jersey Coast Transfer Co., Inc., Common Carrier Application,* 9 M. C. C. 780, 783 (integral area delimited). In the circumstances of this case, the method employed by the Commission is clearly the most accurate available to

represent appellee's "territory"; for the record shows that appellee's transportation was of textiles and empty spools and boxes, from North Carolina to a few regularly visited places in the middle Atlantic coast area, and of oil, linoleum, canned goods, beer and ale, roofing, and screen wire from certain points in the latter area to points in North Carolina and to Columbia, Greenville, and Spartanburg, South Carolina.

4. *Representation to the public.*—On exceptions to the examiner's proposed report, submitted after hearing, appellee contended that it was entitled to a certificate as applied for because it had held itself out to the public to perform transportation service of general freight between any points in the area named in the application.[14] Whether appellee did make the claimed representations is in doubt, as the evidence on this point is conflicting (Statement, *supra*, p. 4). The Commission, in its decision, made no finding as to appellee's holding out, and ruled that in any event

> authority to transport general commodities throughout a wide territory, over irregular and unspecified routes, pursuant to the "grandfather" clauses of the act, should be

[14] It is at least doubtful whether appellee, with eight trucks on June 1, 1935 (R. 26, 62), could have served with any regularity the geographical trade claimed to have been solicited between all points in the coast states from South Carolina to Massachusetts. Such operation with so limited a number of vehicles would hardly have been economically efficient.

granted to a carrier only when such carrier's right thereto has been proved by substantial evidence. * * * On the basis of all the evidence, it is clear that no substantial showing of service has been made to establish bona fide irregular-route operations in the transportation of general commodities from and to all points in the States included in the application (R. 10).[15]

[15] In *Alton R. R.* v. *United States* and *United States* v. *Alton R. R.*, Nos. 110 and 267, this Term, the Commission granted a carrier authority to transport new automotive vehicles from Detroit to all points in several named states (*Fleming Common Carrier Application*, 8 M. C. C. 469, 475–476); in fact, the carrier had been delivering shipments to only a very few points in each state, although the Commission found that he had been holding himself out to carry to any points in the states (*id.* at 474). It is true that delivery to three places only in states such, for example, as Oregon or Kentucky (Record, Nos. 110 and 267, pp. 93, 94, 112–113, 114) would not constitute transportation to enough representative points to entitle a carrier in the *Carolina* type of situation to a certificate covering the whole state as a territory; to this extent the Commission in passing on the Fleming application might appear to have accorded weight to the carrier's holding out as an independent factor.

But the Commission's action there rests ultimately upon the fact that the carrier had, in effect, been serving with the product of a single industry the areas for which the points actually visited were distribution centers. Points of distribution are limited in number, are frequently shifted, and sales at one place are subject to considerable fluctuation in volume and frequency (*Fleming Common Carrier Application*, *supra*, at 473); only by giving the carrier authority to serve all points in an area could the Commission ensure that a carrier such as Fleming would be

The District Court embraced appellee's position and held (R. 29–30) that appellee was entitled to the certificate applied for since it had done a substantial business in the territory named in the application and held itself out as able and willing to carry general commodities between all points in the area. We think that such a standard of "operation," setting separate store upon the carrier's representations, does not accord with the statute and that the true criterion is whether an applicant has in substance *actually* been engaged in carrying general freight throughout the territory specified;[16] as pointed out earlier (*supra*, p. 21), this standard does not require that each commodity included in the term "general freight" has been transported and each point in the terri-

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licensed to perform in substance the transportation in which he engaged on and after the "grandfather" date.

Because of the special marketing conditions which prevail in the distribution of new automobiles from manufacturer to consumer, the Commission's apparent ruling in the *Alton* case on the significance of holding out would not be applicable by analogy here. See *id.* at 472–474, 475.

[16] It may be significant that Congress in 1940 amended section 203 (a) (14) of the Motor Carrier Act to read:

"The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, * * *." Section 18 (a), Act of September 18, 1940, c. 722, 54 Stat. 920.

Compare the earlier definition, *supra*, p. 16, n. 10. The legislative history of the amending statute is silent on reasons for the change.

tory served. It requires that general transportation and service have been in fact performed as the staple and distinguishing feature of the applicant's business. The Commission has framed its test as follows:

> * * * The question is whether there has been operation within the "grandfather" period consistent with the holding out in the natural and normal course of business. (*Reliance Trucking Co., Inc., Contract Carrier Application*, 4 M. C. C. 594, 595.)[17]

The Government's position in this regard is supported by the interpretation given to the statutory language by this Court in *McDonald* v. *Thompson*, 305 U. S. 263, where the opinion stated (p. 266):

> * * * The expression, "in bona fide operation," suggests absence of evasion, *excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service*, and in context implies recognition of the power of the State to withhold or condition the use of its highways in the business of transportation for hire. * * * [Italics supplied.][18]

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[17] This statement of the test was made concerning a *common* carrier, and has subsequently been repeated by the Commission in common carrier cases. *Fleming Common Carrier Application*, 8 M. C. C. 469, 473; *Loving Common Carrier Application*, 12 M. C. C. 571, 575.

[18] In our argument we have treated this case as raising, in part, questions of law as to the proper construction of the Motor Carrier Act. On the other hand, the case may be

5. *Discrimination.*—The Commission in its report stated (R. 10) in part explanation of its order limiting appellee to operations substantially and in fact performed on and after June 1, 1935:

> * * * Common carriers which are expected to maintain regular service for the movement of freight in whatever quantity offered, to and from all points on a specified route, cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service. * * *

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viewed as presenting only an issue upon which the judgment of the administrative agency, if warranted in the record, would be accepted as final by the reviewing judicial tribunal: whether the particular facts have brought appellee within the statutory language, "in bona fide operation as a common carrier * * * within the territory for which application is made." See *Eastern Carrier Corp.* v. *United States*, 31 F. Supp. 232, 238; *Loving* v. *United States*, 32 F. Supp. 464, 467. The doctrine has been established by this Court in closely analogous situations. *Gray* v. *Powell* (No. 18, this Term, decided December 15, 1941) ("producer"); *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 351 ("member of a crew"); *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125 ("control"); *Shields* v. *Utah Idaho Central R. R.*, 305 U. S. 177 ("interurban"). Under this view of the present case, the function of the District Court on a review of the Commission's order would be limited to the inquiry whether the determination of the Commission was supported by substantial evidence and had a rational basis in law. Our argument on this score is developed in the Brief for the Petitioners in *Gray* v. *Powell*, No. 18, this Term, pp. 11–13, 15–25.

From this expression the District Court inferred a discrimination by the Commission against irregular-route carriers and in favor of regular-route carriers with respect to the criterion of substantial actual operation as a condition on the granting of certificates under the "grandfather" clause of section 206 (a); the court below specified this alleged discrimination as a separate ground for setting aside the Commission's order. A reading of the Commission's report discloses that the quoted sentence possesses no such connotation. Rather, it appears from the Commission's decisions in other cases that the same criterion is applied to regular-route carriers. *Maher Common Carrier Application,* 3 M. C. C. 479; *Maher* v. *United States,* 23 F. Supp. 813, reversed *sub nom. United States* v. *Maher,* 307 U. S. 148. This ground of the District Court's decision is, therefore, altogether without foundation.

6. *Economic consequences of the Commission's order on appellee:*—Equally insubstantial is the alleged effect of the court's finding (R. 23) that the Commission's order will prohibit profitable operation by appellee and force it to retire from business. It may be stated at the outset that such a finding is surely of questionable soundness, when it is remembered that appellee will be able to continue the same operations which constituted virtually all of its business before the Commis-

sion's order and may expand quantitatively those operations. Regardless of the finding, it is clear that even if supported it could not serve to enlarge the statutory "grandfather" rights which Congress has conferred on appellee. Cf. *United States* v. *Maher, supra* (upholding Commission's order to cease and desist from all operations). Those rights were created only by dispensation from the regular requirements which the Act sets up for engaging in interstate transportation. If an applicant has not succeeded in proof of its claim to a "grandfather" certificate as extensive as prayed for, it may always apply to the Commission for that authority on the ground that the service sought to be performed "is or will be required by the present or future public convenience and necessity." Section 207 (a), Motor Carrier Act, 1935, Act of August 9, 1935, c. 498, 49 Stat. 551 (U. S. C., Supp. V, title 49, sec. 307 (a)); cf. *Howard Hall Co., Inc., Eastern Territory Extension,* No. MC–42318 (Sub-No. 1), Record, *Howard Hall Co., Inc.,* v. *United States,* No. 210, this Term, pp. 35–42.

CONCLUSION

The Commission properly limited appellee's certificate of authority to the commodities in fact carried by it in substantial quantity and to the places in fact substantially served by appellee on and after the "grandfather" date. It is therefore respectfully submitted that the decree of the

District Court setting aside and annulling the Commission's order is erroneous and should be reversed.

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DECEMBER 1941.

APPENDIX

The relevant provisions of the Motor Carrier Act, 1935, Act of August 9, 1935, c. 722, 49 Stat. 543, 544, 551, 552, in force at the date of the Commission's order, July 10, 1940, are as follows:

DECLARATION OF POLICY AND DELEGATION OF JURISDICTION

SEC. 202. (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part. (U. S. C., Supp. V, title 49, sec. 302 (a).)

* * * * *

SEC. 203. (a) As used in this part—

* * * * *

(14) The term "common carrier by motor vehicle" means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, * * * (U. S. C., Supp. V, title 49, sec. 303 (a) (14)).

* * * * *

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

SEC. 206. (a) No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations; *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate with-

out requiring further proof that public convenience and necessity will be served by such operation, * * *. (U. S. C., Supp. V, title 49, sec. 306 (a)).

TERMS AND CONDITIONS OF CERTIFICATE

SEC. 208. (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in the case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; * * * (U. S. C., Supp. V, title 49, sec. 308 (a)).

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